BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of	)	
	)	
JEFFERY SCOTT	)	File No. BPH-910213ME
	)	
For Construction Permit for a New FM Station on Channel 278A at Bethany Beach, Delaware	)	

To: The Chief, Mass Media Bureau

REPLY

Jeffery Scott ("Scott"), by his attorneys and pursuant to Section 1.45(b) of the Commission's Rules, hereby replies to the Opposition of Eicher Communications, Inc. ("Eicher") to Scott's July 2, 1991 Petition for Leave to Amend his above-captioned application. In support whereof, the following is shown.

In his July 2, 1991 amendment, Scott modified the engineering section of his application to specify, pursuant to Section 73.215 of the Commission's Rules, appropriate contour protection with regard to co-channel Class B station WGMS-FM, Washington, D.C. Scott did not change any other aspect of his technical proposal, as previously specified in the form of an amendment filed as of right on May 16, 1991.

In his Petition for Leave to Amend, Scott demonstrated that his amendment satisfied the "good cause" requirement of Section 73.3522(a)(6) of the Commission's Rules, 47 C.F.R.

§ 73.3522(a)(6), as interpreted in Erwin O'Conner Broadcasting Company, 22 F.C.C.2d 140, 143 (Rev. Bd. 1970) ("Erwin O'Conner"). See Scott Petition at 4. Specifically, Scott stated that his amendment was necessitated by a recently-announced modification of Section 73.213(c) of the Commission's Rules, and therefore was not precipitated by Scott's voluntary act. Id. at 3-4 (citing Memorandum Opinion and Order in MM Docket No. 88-375, FCC 91-128 (released May 30, 1991) ("Six Kilowatt Recon. Order")). Scott also showed that his amendment was filed with due diligence, as it was tendered to the Commission nearly two weeks before the rule revision announced in the Six Kilowatt Recon. Order became effective. Id. at 4.

In its Opposition, Eicher asserts that Scott has failed to satisfy the due diligence and voluntariness criteria of the Erwin O'Conner test. Eicher Opposition at 3-4. According to Eicher, the Commission's Six Kilowatt Recon. Order did not modify Section 73.213(c); it merely "clarified" what had been Commission policy since 1989 concerning grandfathered short-spaced Class A FM stations. Id. at 3 & n.3 (citing Six Kilowatt Recon. Order, slip op. at 2 n.7). Eicher argues that inasmuch as the rule change in question was not a rule "change" at all, Scott "must be charged with knowledge" that the mileage separations specified in Section 73.213(c)(1) were not available to him at the time he filed his May 16, 1991

amendment. Accordingly, Eicher concluded that Scott's July 2, 1991 amendment was neither involuntary nor diligently filed. Id. at 3-4.

Because Eicher premised its Opposition exclusively on the fact that the Commission described one aspect of its action in the Six Kilowatt Recon. Order as a clarification of Commission policy, it has overlooked a number of essential facts. First, it ignored the fact that until it was amended in the Six Kilowatt Recon. Order, Section 73.213(c), on its face, authorized applicants for new stations on FM channels allotted as the result of petitions for rule making filed prior to October 2, 1989 to utilize the relaxed separation criteria of Section 73.213(c)(1). See 47 C.F.R. § 73.213(c) (1989). The fact that the former rule specified that applications for such allotments "may" be authorized pursuant to the spacing requirements of Section 73.213(c)(1) appears intended merely to anticipate the possibility that some pre-October 1989 allotments will satisfy the current requirements of Section 73.207 of the Commission's rules.1/

Next, Eicher's argument fails to address the facts that the Commission: (a) made a major textual revision to

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1/ Certainly, Eicher's strained reading of the word "may" as used in the former rule has no basis in either law or fact. Under Eicher's interpretation, the rule would become completely arbitrary, with no guidelines for deciding when a proposal "may" be authorized and when it "may not" be authorized.

Rule 73.213(c) to accommodate its "clarification;" (b) clearly identified its action as an amendment to its rules; and (c) specified an effective date of July 15, 1991 for the new rule, rather than making the revision retroactive. Six Kilowatt Recon. Order, slip op. at 8. Eicher also failed to specify the origins of the policy that the Commission was supposedly merely clarifying. It was unable to cite any language from the Commission's original decision in the Six Kilowatt proceeding which supports its assertion that the "policy" announced by the Commission in the Six Kilowatt Recon. Order was in existence prior to the release of the decision on reconsideration.

It thus appears that Eicher's emphasis on the significance of the Commission's use of the term "clarify" in connection with the amendment of Section 73.213(c) is totally misplaced. Clearly the Commission has promulgated a substantive revision to its rules, and employed the procedures required under the Communications Act and principles of administrative law to implement that revision.

In this last regard, Eicher fails to appreciate that its Opposition, by advocating that the Bureau dismiss Scott's application on the basis of a rule whose language the Commission found so ambiguous or imprecise as to require modification in the Six Kilowatt Recon. Order, calls for the Bureau to act in a capricious manner. This alone is sufficient

reason to reject Eicher's position. See Rochelle C. Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous).[2/]

Conclusion

In sum, Scott's July 2, 1991 amendment was filed in response to a change in Section 73.213(c) of the Commission's rules, and therefore was not the result of a voluntary action on Scott's part. Moreover, Scott acted with due diligence by amending his application before the rule change even became effective. The Bureau should accept Scott's amendment and summarily deny Eicher's Opposition.

Respectfully submitted,

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July 29, 1991

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2/ It should also be noted that "[i]t is well-established that no party has a vested interest in the disqualification of a competing applicant." Bison City Television 49 Limited Partnership, 52 R.R.2d 63, 65 (Rev. Bd. 1982) (citing Azalea Corp., 31 F.C.C.2d 561 (1971)).

CERTIFICATE OF SERVICE

I, Katharine K. Bryant, do hereby certify that a copy of the forgoing "Reply" was mailed, United States first-class postage prepaid, this 29th day of July, 1991 to the following:

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